

No. 12561

United States
Court of Appeals
For the Ninth Circuit.

LIBBY, McNEILL & LIBBY, a Corporation,
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, Composed of
the Territorial Insurance Commissioner, At-
torney General for Alaska and the Territorial
Commissioner of Labor and John Landro,
Appellees.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska
First Division

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PAUL P. O'BRIEN,
Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Territorial Attorney General,

Juneau, Alaska,

For Appellees Alaska Industrial
Board et al.

COMPLAINT AND APPEAL FROM DECISION
AND AWARD OF ALASKA INDUSTRIAL
BOARD UNDER "THE WORKMEN'S
COMPENSATION ACT OF ALASKA."

Comes now the plaintiff and respectfully appeals to the District Court for the Territory of Alaska, Third Judicial Division, from that certain decision and award, hereinafter mentioned, of the defendant Alaska Industrial Board and complains and alleges:

I.

That the plaintiff, Libby, McNeill & Libby, is now and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Maine and engaged and authorized to engage in business in the Territory of Alaska; that it has paid its annual corporate license tax last due to the Territory of Alaska; that it has filed with the Auditor of the Territory of Alaska and with the Clerk of the District Court for the Third Judicial Division of Alaska its last annual report required to be filed by it by the Laws of Alaska; that it has complied and at all times hereinafter mentioned had complied with the provisions of Section 18, Chapter 9, Extraordinary Session Laws, 1946, Sec. 43-3-18, ACLA 1949, as a self-insurer under said Chapter 9 and does now and at all of said time did hold a certificate as a self-insurer under said law from the defendant, Alaska Industrial Board.

II.

That the plaintiff was at all the times hereinafter mentioned engaged in the operation of a salmon

cannery at Ekuk, Alaska, and had in its employ three or more employees.

III.

That the Alaska Industrial Board, hereinafter designated as Board, was created and now exists by virtue of the provisions of Chapter 9, Extraordinary Session Laws 1946, Sections 43-3-1 to 43-3-39, both inclusive, ACLA 1949, known as the Workmen's Compensation Act of [3*] Alaska, hereinafter designated as "Compensation Act" and under said Compensation Act its membership is composed of the following three persons, namely: The Territorial Insurance Commissioner, Attorney General of Alaska, and the Territorial Commissioner of Labor; that Frank A. Boyle is now and at all the time hereinafter mentioned was the Territorial Insurance Commissioner; that J. Gerald Williams is now and at all the times hereinafter mentioned was Attorney General of Alaska; that Henry A. Benson is now and at all the times hereinafter mentioned was Territorial Commissioner of Labor and the Chairman and executive officer of the defendant Alaska Industrial Board.

IV.

That the relationship of employer and employee existed between the plaintiff and one John Landro on July 5 and 6, 1948, he then having been employed by it as a fisherman in the operation of said salmon cannery by a term of employment beginning on or about June 25, 1948, to July 6, 1948.

* Page numbering appearing at foot of page of Certified Transcript of Record.

V.

That on March 24, 1949, John Landro, hereinafter designated as Claimant, made his written application for adjustment of Claim to the Alaska Industrial Board to obtain medical treatment and compensation for disability to back resulting from injury and when condition becomes fixed to rate the partial permanent disability, under the provisions of said Compensation Act, said injury claimed to have been incurred on the 5th day of July, 1948.

VI.

That plaintiff herein on or about May 26, 1949, filed with said Board its admission of service of and answer to said claim.

VII.

That on the 27th day of June, 1949, a hearing was held before said Board upon said claim, and all the evidence adduced at said hearing, together with the complete file of the Board upon said claim, subject to the objections of the plaintiff herein made at and prior to said [4] hearing, is hereby made a part of this complaint, and the plaintiff herein hereby requests said Board to submit said file to the Court.

VIII.

That thereafter and on June 28, 1949, the defendant Board by all of its said members made and entered its certain decision and award, a true and correct copy whereof, marked Exhibit II is hereunto attached and specifically made a part hereof,

but notice and copy whereof was not given to plaintiff herein until July 8, 1949.

IX.

That said decision and award is erroneous in that:

(1) The Board has no power or authority to hold that plaintiff herein must pay for the cost of a physical examination of the claimant as directed in the last paragraph of said decision and award, after one year from the date of the injury.

(2) The Board has no power and authority to award temporary disability, and to withhold decision as to partial total disability.

(3) The Board has no power or authority to award both temporary disability and partial total disability; and, if any, partial total disability is awarded then no temporary disability can be awarded.

(4) The Board has no power or authority to admit in evidence or to give any credence or weight to ex parte documents as evidence, and in doing so deprives the employer of its right of cross-examination.

(5) The Board erred in admitting in evidence the letter of Dr. Lowell E. Williams, dated May 20, 1949, a true copy whereof, marked Exhibit III, is hereunto attached and specifically made a part hereof, which letter was not only unverified but should not have been received in evidence because

said letter does not comply with the requirements of the Board's Rule of Practice, Article 9(c), but which was received in evidence and upon which letter the Board based its award.

(6) The Board erred in not basing its award upon, and in entirely ignoring, the deposition of Doctor A. Bernard Gray, wherein [5] he testified that claimant's physical condition became fixed on October 1, 1948, a true and correct copy of which deposition is hereunto attached, marked Exhibit I, and specifically made a part hereof.

X.

That the claimant John Landro is without financial means and owns no property in Alaska and should plaintiff pay or be required to pay the award of \$2577.96 for temporary total disability from October 1, 1948, to May 20, 1949, he would be unable to make repayment thereof should said decision and award thereafter be reversed or modified as to the sum to be paid him.

XI.

That the place where plaintiff's said fishing operations were conducted is now and then was in the Third Judicial Division of Alaska and within the jurisdiction of the District Court for the Territory of Alaska, Division Number Three, at Anchorage, Alaska.

XII.

That plaintiff will be substantially damaged unless, pending final decision by this court, stay be

granted of the payment by plaintiff to claimant of the sum so awarded by said decision and award to claimant because claimant is and would be unable to make refund thereof nor could plaintiff by execution or otherwise secure or enforce repayment to it thereof should said decision and award be either suspended, set aside or modified as to the sum, if any, to be paid by it to claimant; that plaintiff's failure or refusal to pay to claimant within 20 days from July 28, 1949, said sum so awarded to claimant by said decision and award subjects and will subject it, unless said decision and award be so stayed pending final decision by this court, not only to being charged with having committed a misdemeanor although having no defense thereto and, upon conviction thereof, to pay a fine of not less than \$50.00 or more than \$500.00, no part of which fine could it recover and which misdemeanor conviction would not be reversible notwithstanding that this court should later either suspend, set aside [6] or modify said decision and award, but also possibly to payment of a penalty of either 10% or 20% upon the principal of the sum so awarded to claimant.

XIII.

That plaintiff prosecutes this its appeal in good faith and not with the intent to fail or refuse to pay to the claimant such, if any, sums as may be finally awarded to him; but, it alleges that, so far as it is informed, the questions raised by its appeal have never been judicially determined by any Alaskan court.

Wherefore, the plaintiff respectfully appeals to the District Court for the Territory of Alaska for the Third Judicial Division from said Decision and Award so made by the defendant Alaska Industrial Board on June 28, 1949, and prays that an order may be entered herein staying, pending final decision in this proceeding, the payment of the amount required by said Decision and Award to be paid by it to said John Landro, and that an interlocutory injunction may be granted herein enjoining the defendant the Alaska Industrial Board and its members, namely: Frank A. Boyle, Territorial Insurance Commissioner; J. Gerald Williams, Attorney General for Alaska, and Henry A. Benson, Territorial Commissioner of Labor, as well as said John Landro from in any wise attempting to enforce, pending final decision in this proceeding, the payment of said amount by plaintiff, and that upon the final hearing herein said Decision and Award of the defendant Alaska Industrial Board may be entirely suspended and set aside, and for such other and further relief as may be meet and equitable in the premises.

Respectfully submitted,

R. E. ROBERTSON,

By /s/ F. O. EASTAUGH,

Of Attorneys for Plaintiff.

PLUMMER & ARNELL,

/s/ E. L. ARNELL,

Of Attorneys for Plaintiff.

United States of America,
Territory of Alaska—ss.

I, F. O. Eastaugh, being first duly sworn upon oath, depose and say: I am agent of the plaintiff corporation; that I have read the foregoing complaint, know its contents and they are true as I verily believe; that I make this verification on behalf of the plaintiff because no President, Treasurer, Secretary or other officer of the plaintiff is now in or a resident of Juneau, Alaska, the place where this verification is made.

F. O. EASTAUGH.

Subscribed and sworn to before me this 27th day of July, 1949, in Juneau, Alaska.

[Seal] M. E. MONAGLE,
Notary Public for Alaska.

My Commission expires March 1, 1950. [8]

EXHIBIT NO. I

DEPOSITION OF DR. A. BERNARD GRAY

called as a witness on behalf of the defendant.

Pursuant to stipulation by and between the Applicant, by his attorney, Henry Roden, Esq., and the Defendant, by its attorney R. E. Robertson, Esq., the deposition of Dr. A. Bernard Gray, called as a witness on behalf of the Defendant in the above-entitled matter, was taken on this 22nd day of June, 1949, at the hour of 12:00 o'clock M., at

602 Central Building, Seattle, King County, Washington, before E. E. Lescher, Notary Public in and for the State of Washington, residing at Seattle;

The Plaintiff appearing by Roe E. Jackson, Esq., representing Henry Roden, Esq., attorney for the Applicant;

The Defendant appearing by Robert V. Holland, Esq., (of Messrs. Bogle, Bogle & Gates), appearing on behalf of R. E. Robertson, Esq., attorney for the Defendant.

Thereupon, the following proceedings were had, and testimony given, to wit:

* * *

Mr. Holland: Let the record show that this deposition is being taken pursuant to written stipulation dated May 27, 1949, at Juneau, Alaska, signed by Mr. Henry Roden, Esq., Attorney for Applicant, represented here by Roy E. Jackson, and signed by R. E. Robertson, Esq., attorney for the Defendant, represented here by R. V. Holland, of the firm of Messrs. Bogle, Bogle & Gates.

(It was stipulated by and between the parties through their respective representatives that all objections, except as to the form of the question, or the responsiveness of the answer be reserved until the time of the hearing, and that the signature of the witness to his said deposition is waived, to which the witness himself assented.)

DR. A. BERNARD GRAY

being first duly sworn as a witness on behalf of the Defendant, was examined, and testified as follows:

Direct Examination

By Mr. Holland:

Q. Will you please state your name?

A. A. Bernard Gray.

Q. Where do you practice, Doctor?

A. In the Stimson Building, Seattle.

Q. What type of practice do you follow, if any?

A. Orthopedic and Traumatic Surgery.

Q. When did you graduate from Medical School, Doctor?

A. In 1935.

Q. What school?

A. The University of Manitoba.

Q. What degree did you obtain at that time?

A. M.D.

Q. Have you had any medical training since that time at any institutions?

A. Yes, I was intern at the Winnipeg General Hospital. I was a resident at Deer Lodge, at Winnipeg, and at the Sea View Hospital in New York. I was Attending Orthopedic Surgeon for three years at the Permanente Foundation Hospital at Oakland, California. I have been practicing my specialty in Seattle since 1945.

Q. Just briefly what were your duties at the Permanente Hospital in California, Doctor?

A. I was in charge of the section handling fractures and injuries.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Q. Did you have a staff under you at that hospital? A. Yes.

Q. Of what did your staff consist?

A. Assistants in the clinic, and in the wards, and in the emergency room, and also in the first aid stations in the shipyards. This hospital was established to look after 100,000 workers that [10] worked at the Kaiser Shipyards in Northern California.

Q. How many beds in the hospital?

A. We had two hospitals, totaling approximately 400 beds.

Q. Did you have occasion in your practice in Seattle to examine or treat John Landro?

A. Yes.

Q. In what way did this man come to you?

A. He was sent to me following an injury which he sustained in Alaska on July 6, 1948. I first saw him on July 23, 1948. He stated that he was injured on July 6th, while aboard his fishing boat, when he fell off the top of the centerboard box and struck his lower back against some planks. He said that he had considerable pain and returned to the power scow and did not resume fishing.

He further said that the next day he was taken to the cannery. He said that he had considerable pain and could not straighten up. He was given hot treatments which eased his pain somewhat, and then he was sent from that cannery, the Ekuk Cannery,

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

to Koggiung Cannery, where he was seen by the doctor, and where he was treated by injections.

Q. Is this foregoing part of the history which you received from him?

A. This is what he told me on July 23rd.

Q. Did you receive any additional history from him, Doctor?

A. I may have seen the accident report, but I do not have any record of it right now. He said that his back pain became progressively worse, and he returned to Seattle, arriving here on July 20, 1948.

We checked his past history. He said that he was a fisherman and had been for 15 years, and that between seasons he had been employed as a Mate in the Merchant Marine.

He said that he had had no previous back trouble; that [11] in 1926 he had a stomach ulcer operation, and in 1928 a compound fracture of the right arm. He said that he was single.

Q. Doctor, what was his condition at the time that you examined him, and what, if any, complaints did he make at that time?

A. He was up and around, and he was living at a hotel in Seattle. He complained of a constant severe pain across his lower back, and he said that he had difficulty in walking because of this pain. Any motion caused a stabbing pain in the right side of the lower back, and he said that he could not bend or stoop because of this pain. He felt that

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

he was not getting any better. He said that the pain radiated up in both hips and the upper thighs, but there was no numbness in his legs. He further said that coughing or sneezing aggravated the back pain—the lower back pain, but there was no radiation of the pain.

Q. Did you make an examination of him at that time, Doctor? A. Yes, sir.

Q. What were the findings of your examination?

A. I noticed that he was a somewhat thin man of 46, who appeared to be in apparent distress, and who appeared to be somewhat older than his stated age. His height was 5 feet 10 inches, and his weight was 134 pounds.

The examination of the head and neck were essentially negative. The cranial nerves were normal. His teeth were in fair condition, and his tonsils had been removed. There was a good range of painless motion of the cervical spine. Both upper limbs were normal, except for the right forearm where there was considerable atrophy of the dorsal muscles and several scars due to an old compound fracture. Heart and lungs were negative. His blood pressure was 140/84, which is normal. His abdomen was negative except for the scar from his operation. There was no hernia.

An examination of the back revealed that he stood erect, [12] with considerable spasm of the muscles of the lumbar spine and flattening of the lumbar curve.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Tenderness was mainly localized to the right ilio-lumbar region.

On forward flexion with the knees straight, the fingertips failed the floor by four inches, which indicated a good range of motion, but this aggravated the back pain, and it was noted that the lumbar spine remained fairly rigid throughout this motion.

Hyperextension was not particularly painful, but was limited to about 50 per cent. Right and left lateral flexion and rotation of the spine were somewhat limited and painful.

Straight leg raising was to 70° on each side, without pain, and pelvic rotation did not reproduce the pain.

There was a full range of motion of all the joints of the lower limbs. Both lower limbs were essentially normal. Reflexes, sensation and circulation of each lower limb was normal.

Q. Were any X-rays taken?

A. Yes. I made some radiographs. These revealed no evidence of injury except for some narrowing of the right side of the body of the fourth lumbar vertebra as compared to the left side. However, no fracture lines were visible, and the remaining vertebrae were normal.

Q. Doctor, what type of X-rays were those that you just referred to?

A. They were X-rays taken of both views of the lower spine.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Q. Were any stereoscopic X-rays taken at any time?

A. Yes. I had stereoscopic X-rays taken in the Department of Radiology at the Providence Hospital of Seattle.

Q. Did you see those X-rays, Doctor?

A. Yes.

Q. What did they reveal? [13]

A. These revealed that there was no evidence of any injury of the fourth lumbar vertebra.

Q. What, Doctor, did they reveal regarding the comment that you made just before this, that the X-rays in the office showed a slight, or were showing a narrowing of the right side of the body of the fourth lumbar vertebra?

A. These X-rays were seen by me, and were seen by the Radiologist.

Q. Speaking now of the stereoscopic X-rays, what did they reveal?

A. They revealed no evidence of fracture or bone injury about the body of the fourth lumbar vertebra.

Q. After your examination of them, Doctor, from which you made the findings, about which you have just testified, that being on the date of July 23, 1948, what was the course of treatment, if any, that you gave to this man?

A. I advised hospitalization. I admitted him to the Providence Hospital at Seattle on July 24, 1948

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

—no, July 23rd. As a matter of fact, he was admitted on the same afternoon.

Q. And will you just outline the course of treatment during the period of time that he was in the hospital?

A. He was in the hospital between July 23 and July 31. He was treated by bed rest, by physiotherapy, and by application of a lumbar sacral brace. He improved considerably, and he was allowed to leave the hospital after eight days, with essentially no discomfort. However, after he was up and around, he complained of some recurrence of the low back pain, and he was treated by me in the office by injections, and physiotherapy treatments were continued, as an out patient in the physiotherapy department of the Providence Hospital.

Q. During what course of time did these injections and physiotherapy treatments continue?

A. He was treated until October 15, 1948, at which time there had been considerable relief of his low back discomfort. [14] His main complaint was that the back tired easily, and he also developed some complaints of pain throughout the upper spine, varying in degree from time to time.

My examination on October 29, 1948, indicated that his condition had been stationary for at least four weeks. It was my opinion on that date that he was fit to go to work; that there were no special findings on objective or subjective examination or symptoms.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Q. Doctor, at that time did you form any conclusion as to the existence of any permanent partial disability by reason of his then condition?

A. Yes. I felt that the subjective symptoms represented a disability of about 10 per cent, and I recommended that if his claim was in order, it could be closed on such an award.

Q. Doctor, during your initial examination, and following treatment of this man, did you form any conclusions, or did you make any diagnosis as to the cause of his complaints in his low back area?

A. Well, there was progress there between the time he left the hospital and October 29th.

I noted that he developed a mild setback the first week in September, when he developed an upper respiratory infection associated with inflammation of the muscles of the upper dorsal spine—a myositis.

Examination on September 30, 1948, revealed that he no longer was wearing his brace, and that there was a good range of motion, and that there were no areas of tenderness over his lower spine. However, he had areas of tenderness in his dorsal spine.

Previously I had noted, on August 31, 1948, that improvement had been rapid, with almost complete relief of pain. The patient was up all day; was starting to abandon the use of his brace, and was put on exercises to increase his muscles to tone [15] so that he could be returned to work.

My diagnosis in this case was an acute contusion

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

and strain of the lower lumbar spine, which occurred July 6, 1948, and which resulted in symptoms which gradually subsided, and my diagnosis of his upper spine was that it was due to an infectious myositis or rheumatism of the muscles of the dorsal spine.

Q. This matter of the infectious myositis would have no relation to the history of his accident which occurred on July 6, 1949?

A. I am inclined to think not.

Q. And what were the findings and the conditions which you noted, or led you to your conclusion of the 10 per cent partial disability?

A. No evidence of any disability in the lower spine on clinical examination, and complaints of the lower spine tiring more easily. In other words, there was no objective evidence of disability, and I gave him his award on the basis of his subjective symptoms.

Mr. Holland: No further questions.

Cross-Examination

By Mr. Jackson:

Q. Doctor, when Mr. Landro came to you on July 23, 1948, you said that he was in pain at that time. Is that correct? A. Yes.

Q. And I think you spoke or used the term that you found muscle spasm in the spine, would you just describe for the record what muscle spasm is?

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

A. A condition of excessive tone of the lumbar muscles. A condition where the muscles won't relax, which signifies an attempt of the muscles to split the lower spine to relieve pain, due to motion of the lower spine.

Q. When you observe, however, muscle spasm in the spine, you have pain with it, is that correct? [16]

A. In this particular case it seems so.

Q. Now, Doctor, I want to ask you if on an examination of the X-rays that were taken you found evidence of Mr. Landro having arthritis of the spine?

A. I noted that there was a very slight lipping of the vertebrae. There was a small spur at the margins of the vertebrae. These indicated a response to wear and tear, a so-called degenerative arthritis of the spine, which is in a working man a fairly normal recurrence. The extent varies a lot. It is not a true arthritis. It is what is more accurately known as an asteo-arthritis, but more commonly known as hypertrophic arthritis.

Q. And will you tell us where you observed that in the spine, Doctor—this arthritis?

A. Well, what I observed was this lipping or slight spur formation, and I observed it at the lower lumbar vertebrae.

Q. Would that be in the region of the fourth and fifth lumbar?

A. Yes, sir.

Q. Did you find any evidence, Doctor, of a narrowing of the fifth intervertebral disc space

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

posteriorly? A. No.

Q. Did you make any determination, Doctor, from a study of the X-rays that there had been, or was, a definite accentuation of the normal lumbar lordosis with the sacrum approaching the horizontal position? A. No.

Q. You say that you did not?

A. No. I did not.

Q. What was your answer? A. No.

Q. Well, Doctor, did you make any determination as to the postural condition of his spine at the time of your examination, or treatment, as to whether or not this spine at the time you saw him, or during the course, or after this injury, was normal or abnormal?

A. There were no abnormal lateral curves at the time that I first saw him. His lumbar curve was somewhat flattened, rather than accentuated. As his condition improved, he had some increase of the normal dorsal outward bowing such as are seen on round-shouldered people. There was no evidence that his lumbar curve was particularly abnormal.

Q. Now, Doctor, isn't it a fact that following October 1st,—or do you remember when you stated that you thought that he was able to go to work?

A. October 29, 1948, I noted that I thought he was fit to go to work. I also noted when I examined him on September 30, 1948, that I felt that he had made satisfactory progress, that he was fit

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

to work, and that his temporary disability could be terminated on October 1, 1948.

I also noted that I doubted very much that he would return to work, as his usual occupation was on board a vessel, and it was my understanding from him that there were no jobs available at that time. However, there were essentially no findings from objective symptoms of further disability.

Q. Now, I would like to ask you, when it was that he was having this trouble that you spoke of in the upper back?

A. He developed that during the first week in September, following his cold—he had these complaints, and when he was examined on October 29, 1948, he had complaints of pain throughout the upper back.

Q. And this pain did he tell you had persisted—had been persisting all the time?

A. Yes. It was never in particularly the same position. It varied in his back.

Q. But he had pain during all the time since this accident? [18]

A. No. He had no pain in his upper back until the first week in September, which was his first complaint of pain in the upper back.

Q. Now, didn't he also tell you that he had pain in the lower back all the time that you were treating him?

Mr. Holland: This is in the lower back, you have stated?

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Mr. Jackson: Yes, in the lower back.

A. No. When I examined him he said that his lower back was tired, and there was some pain at irregular intervals. At that time, there were no areas of tenderness.

Q. He said that his back was tired, but he told you that he also was having pain, didn't he?

A. I note that he complained of some pain at irregular intervals.

Q. And he told you all this time that he had not been able to go back to work, isn't that correct?

A. Well, I know that during all this time he didn't go back to work.

Q. Now, Doctor, I would like to ask you this, in March of 1948. What was the condition of his back then when you saw him last?

A. In March of 1949, you mean?

Q. In March of 1949, I mean.

A. Well, I do not have my daily record with me, but as I recall, he came in some time last spring and said that he had seen another doctor, and he had complaints of pain. In fact, as I recall, most of his pain was in his upper back. I advised him at that time that once his case was closed, it might be advisable for him to report to the Marine Hospital, as he was eligible for treatment for this condition.

I also advised him that if he wished he could report to me at my clinic at the County Hospital, and I would see that he would get some care if

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

he was not in a position to undertake [19] private care; that I felt that his condition was not related to the injury.

Q. Now, Doctor, can you tell us what his trouble was in March of 1949, when you told him to go to the Marine Hospital or Harborview?

A. He said that he felt sick. He said that he felt weak and had rheumatic pains that apparently were generalized.

Q. And you felt that he was in need of treatment at that time? A. Yes, sir.

Q. And, Doctor, did you make any determination when you examined him, or treated him at any time, whether the injury had aggravated the arthritis of the spine?

A. There is no way that I know of whereby I can make an exact determination as to whether an injury aggravated an arthritis of the spine, except by subjective complaints, or except where there is definite bone change, resulting from the injury.

Q. Does medical science recognize that an injury such as Mr. Landro had can aggravate an arthritis of the spine? A. Yes.

Q. And, Doctor, can an injury such as Mr. Landro had, and suffering from the pain that he did in this case when he came to you, and the treatment that he was receiving, can that condition lower his resistance and make him more subject to develop an infection than an ordinarily normal, healthy person? A. I do not think so.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Q. You do not think so? A. No, sir.

Q. Well, can lowered resistance of an individual make him more susceptible to catch cold than if he is normal and healthy?

A. Yes. That is, roughly speaking in regard to what you and I understand commonly by lowered resistance. [20]

Q. Now, I would just like to ask you if this is not a fair question, that ever since this accident, or ever since he came down, and on July 23, 1948, down to when you saw him in March, he was complaining of trouble in his back?

Mr. Holland: I think you should relate that to what part of the back, since you have had testimony with reference to two separate parts.

Q. (By Mr. Jackson): If he was not complaining of pain and discomfort in the lumbar back during this whole period.

A. Well, during the latter part of my treatment, his symptoms were more or less concentrated in his upper back and not in his lower back. Obviously, he had some complaints referable to his lower back, to the extent that I felt that he was entitled to a permanent partial disability award. These complaints were not marked, and they were mainly subjective.

Mr. Holland: This period that you are referring to, then, in your answer, means the period of your treatment in the fall of 1948?

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

The Witness: Yes. He was not treated by me during 1949.

Q. (By Mr. Jackson): I see.

A. I saw him, and he was having trouble, and I wanted to see that he got some care, but he came in to see me because he wanted my opinion, and I told him that I didn't think that this related to the condition for which I had treated him, and I gave him the best advice that I could.

Q. Doctor, isn't it a fact that in March of 1949, when he came in to see you in the condition that he was in, he would have a very difficult time holding down a job that would require manual work?

A. I am inclined to think so.

Q. Doctor, I would like to ask you this, are you the physician for Libby, McNeill & Libby? [21]

A. I examine cases at the request of—I examine their injured men at the request of their attorneys. I do not feel that I am particularly the physician for Libby, McNeill & Libby. I have been asked to examine these injured seamen, and fishermen and evaluate their disabilities, and to undertake treatment, and bill for whatever I do.

Q. I was going to ask you also as to whether or not you do examine men going to Alaska for Libby, McNeill & Libby, prior to the time that they go? A. Yes, most of them.

Q. That is, Libby sends the men over to you for examination?

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

A. I examine most of them.

Q. Do you examine for any other packing companies going to Alaska? A. No.

Q. And how long have you been doing that work for Libby, McNeill & Libby?

A. About four years.

Q. And do you do that work on a retainer basis, or do you get paid on an individual basis?

A. I get paid on an individual basis.

Mr. Jackson: That is all.

Redirect Examination

By Mr. Holland:

Q. Doctor, you said in answer to Mr. Jackson's question, that an injury can aggravate an arthritis or an arthritic condition in the spine. And I will ask you whether or not the fact that the site of the injury is different than that where the arthritis is observed, or where the symptoms occur, whether or not a difference in the location of those two has any relation to the probability that the injury itself has aggravated the arthritic condition?

A. Yes. It has a great deal to do with the relationship because [22] we have really not much scientific basis to go on that injuries aggravate arthritis. We do know that in far advanced cases of hypertrophic arthritis that may be causing those symptoms—an injury will cause symptoms to recur. But I feel in those cases the injury should directly

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

affect the particular portion of the spine. I cannot conceive how an injury to one set of joints will cause an injury to another set of joints with hypertrophic arthritis.

Q. Your term of "set of joints," would that be applicable to the lower back on the one hand, and the upper back on the other hand?

A. That is right.

Q. Doctor, you mentioned that the lipping and the spurs which you observed in the X-rays were indicative of the degenerative arthritis of the spine, and that that was a fairly normal occurrence in working men. Would you state just what that arthritis is? In other words, what causes that type of arthritis, and what you mean by the word, "degenerative"?

A. Well, the reaction to wear and tear in the spine causes the corners of the vertebrae in the X-rays to show little spurs. These spurs are due to beginning calcification, and bone formation in the ligaments.

These spurs vary from minute to extensive, and occasionally with the adjacent vertebrae the spurs will continue to form a bridge of bone.

It is an attempt of the body to join up two vertebrae and take the motion away. It is a response to wear and tear. It is a normal occurrence, and it can reach quite a marked stage without symptoms. It is more common in working men. The harder people work, the earlier they get them. We

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

feel that these changes to a slight degree are normal in people over the age of 40, [23] and, as a matter of fact, occur to this extent quite frequently under the age of 40.

They are not a true arthritis. They are not a true result of the inflammation of the joints.

Mr. Holland: I have no other questions.

Recross-Examination

By Mr. Jackson:

Q. Now, Doctor, on the subject of arthritis, if you have an aggravation of arthritis in the lower spine, that can also produce symptoms many times in the upper portion of the spine, isn't that true?

A. Pain in the lower spine can produce symptoms elsewhere. That is perfectly true, but I do not think that they produce this type of thing, where there is pain and spasm and tenderness of the muscles of the upper spine during the period when the condition in the lower spine is subsiding.

Q. Well, would there be a difference among you doctors, as to whether or not an injury such as Mr. Landro had to his spine could produce the symptoms in the upper spine?

A. Well, obviously, there are differences of opinion in everything. All I can give you is my own opinion, based upon examination and experience in treating a lot of back injuries.

Mr. Jackson: I think that is all.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

Mr. Holland: That is all. By the way, Doctor, will you agree to the waiving of your signature to this deposition?

The Witness: That is right, I will.

(Witness excused.)

(Deposition concluded.) [24]

CERTIFICATE

State of Washington,
County of King—ss.

I hereby certify that on the 22nd day of June, 1949, before me, E. E. Lescher, a Notary Public in and for the State of Washington, residing at Seattle, Washington, at 602 Central Building, Seattle, King County, Washington, personally appeared, pursuant to stipulation, of Proctors for the respective parties, beginning at the hour of 12:00 o'clock m., Dr. A. Bernard Gray, a witness called on behalf of the defendant in the foregoing entitled matter for the purpose of taking his deposition;

The plaintiff appearing by Roy E. Jackson, Esq., representing Henry Roden, Esq., attorney for the Applicant;

The defendant appearing by Robert V. Holland, Esq. (of Messrs. Bogle, Bogle & Gates), appearing on behalf of R. E. Robertson, Esq., attorney for the defendant.

(Deposition of Dr. A. Bernard Gray.)

Exhibit No. I—(Continued)

The above witness being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, and being carefully examined, deposed and said as in the foregoing transcript of the deposition set out.

I Further Certify that the said deposition has been reduced to typewriting under my personal direction by a competent person, and that said deposition is a correct transcript of the testimony as given by the witness; and that the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Board as required by law.

I Further Certify That the reading over to or by the said witness of his said deposition were by the parties hereto and the witness himself expressly waived.

I Further Certify that I am not of counsel or attorney or proctor for either or any of the parties, nor am I interested in the event of the cause.

Witness My Hand and Official Seal at Seattle, Washington, this 24th day of June, 1949.

[Seal] E. E. LESCHER,
Notary Public in and for the State of Washington,
Residing at Seattle. [26]

EXHIBIT II

Alaska Industrial Board,
Territory of Alaska

JOHN LANDRO,

Applicant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,
Defendant.

BOARD DECISION AND AWARD

Pursuant to the application of the above-named applicant, John Landro and a hearing by the full Board, at which time the applicant was represented by Attorney Henry Roden and the defendant was represented by Attorney R. E. Robertson, the Board considered the case on the merits and finds as follows:

Finding of Fact

1. Applicant, John Landro, was injured on July 5 and July 6, 1948, while employed by defendant employer corporation, Libby, McNeill & Libby, at Clarks Point, Alaska, as a fisherman. Injury resulted from accident in which applicant fell while going between boat and scow on July 5, 1948, and again fell on back in the boat on July 6, 1948, sustaining an injury to his back.

2. Applicant was given medical care by Dr. Fortun, defendant's doctor at Koggiung and was sent

to Seattle for further treatment by Dr. A. Bernard Gray. Medical care was furnished and temporary disability compensation was paid for the period ending September 30, 1948.

3. Subsequent to September 30, 1948, applicant required medical care which he provided at his own expense.

4. Examination by Dr. L. E. Williams, applicant's own physician, applicant's condition was now fixed and rated his at "40% of the maximum for unspecified permanent partial disability." Contrary opinions have been submitted by other medical examiners. [27]

5. That applicant suffered Temporary Total Disability from July 6, 1948, to May 20, 1949.

6. That applicant was paid compensation from August 1, 1948, through September 30, 1948, on the basis of \$17.176 per day.

7. That applicant was in good health prior to the injury and had been working as a fisherman and mate on steamships—both jobs requiring considerable physical activity.

8. That compensation for Temporary Total Disability was not paid from October 1, 1948, to May 20, 1949.

9. That jurisdiction of the Board, the employer-employee relationship and the applicability of the Alaska Workmen's Compensation Act was not in dispute.

Considerations of Applicable Law

1. The A.W.C.A. is applicable, the Board has jurisdiction and an award may issue.

2. Applicant, John Landro, sustained personal injury by accident arising out of and in the course of his employment while rendering service to defendant employer, Libby, McNeill & Libby, a corporation, on June 5 and June 6, 1948.

3. Applicant is entitled to compensation for ensuing Temporary Total disability at the rate of 65% of his average daily wages of \$17.176 from October 1, 1948, to May 20, 1949.

4. Applicant is entitled to necessary medical expenses as provided by the Act.

Award

From the finding of fact and consideration of applicable law as aforesaid, and the files and records in the case, the Board hereby awards applicant John Landro the sum of \$2,577.96, which represents two hundred thirty-one (231) days' Temporary [28] Total Disability Compensation, computed by multiplying \$17.176 (average daily wage) by 231 (representing the period of disability October 1, 1948, to May 20, 1949).

The applicant's present physical condition as to any permanent Total Disability resulting from the injuries of July 5 and July 6, 1948, are in such conflict as to preclude any Board decision or award

at this time and therefore the Board directs the applicant to present himself for an independent medical examination and rating to Dr. H. T. Buckner, 208 Cobb Building, Seattle 1, Washington. Cost of said examination to be borne by defendant employer Libby, McNeill & Libby.

Dated: June 28, 1949, at Juneau, Alaska.

.....,
Chairman. Commissioner of
Labor.

FRANK A. BOYLE,
Member,
Insurance Commissioner,

J. GERALD WILLIAMS,
Member,
Attorney General.

Dated: June 29, 1949, Juneau, Alaska.

I hereby declare this to be a true and correct copy of the above case.

/s/ HENRY A. BENSON,
Commissioner of Labor. [29]

EXHIBIT III

Lowell E. Williams, M.D.

1004 4th & Pike Bldg.

Tel. Eliot 1243

Seattle 1, Wash.

May 20, 1949.

Roy E. Jackson, Attorney at Law,
American Building,
Seattle, Washington.

Re: John Landro.

Dear Mr. Jackson:

Mr. Landro was re-examined today relative to the condition of the low back resulting from injury July 6, 1948.

He has received no treatment since the last examination, March 19th, but has gained about five pounds in weight. His complaints are the same as previously, and the objective physical findings are the same.

Mr. Landro is able to do light work, if any were available, but is not able to perform regular labor.

I would still estimate his disability as 40% of the maximum for unspecified permanent partial disabilities.

Very truly yours,

/s/ L. E. WILLIAMS.

[Endorsed]: Filed July 28, 1949. [30]

STIPULATION TO MAKE JOHN LANDRO
PARTY DEFENDANT

The parties to the above-entitled cause do hereby stipulate and agree that one John Landro may be made a party defendant in the said cause.

Dated the 7th day of October, 1949.

R. E. ROBERTSON,
Attorney for Plaintiff.

J. C. WILLIAMS,
Attorney for Defendant,

By JOHN H. DIMOND,
Assistant Attorney General.

ANSWER OF DEFENDANT

Comes the defendant, John Landro, and in answer to plaintiff's complaint on file in this cause:

Denies each and every the material allegations, matters and things set forth in paragraph nine of said complaint and the whole thereof.

HENRY RODEN,
Attorney for John Landro.

Duly verified.

[Endorsed]: Filed October 26, 1949. [32]

APPLICATION FOR ADJUSTMENT
OF CLAIMTerritory of Alaska
Alaska Industrial Board
Alaska Workmen's Compensation Act

Note:—Either party to the dispute may apply to the Board for adjustment of any matter in difference. The original application and two copies for the defendant must be mailed to Board at Juneau, Alaska. Due notice will thereafter be given of the time and place of hearing. Either party may be represented in person, by agent or by attorney.

JOHN LANDRO,

Applicant,

vs.

LIBBY, McNEILL & LIBBY,

Defendant.

Applicant's address: c/o Savoy Hotel, Seattle, Washington.

Defendant's address: 87 Hanlin Street, Seattle, Washington.

1. John Landro, age 46, while employed as Fisherman on July 5, 1948, at Clark's Point, Alaska, by Libby, McNeill & Libby, who is subject to the Act, sustained injury arising out of and in the course of said employment as follows: Slipped in jumping from scow to boat in rough water, striking lower part of my back on boat, causing severe

pain; on July 6 again fell in boat reinjuring back further; back became very painful, had to stop work, and has resulted in severe injury in lower lumbar back, producing a stiff, painful back and inability to work.

2. Injured left work on July 6, 1948, and disability continued to Present Time.

3. Last payment of compensation on 9-30-48; Last medical furnished by employer on 10-15-48. Notice of Injury given employer on July 6, 1948.

4. Medical and surgical treatment has been rendered by Dr. Bernard Gray, Seattle, Washington; and Company Doctor at Naknek, Alaska.

5. Employee's wages were \$63.98 per day, working Fishermen's hours per day, 6 days per week, plus board of \$1.00 per day. Wages 1948 fishing season from 6-25 to 7-22-48, \$1791.35.

6. Total compensation paid to date, \$680.76 for a period from 8-1-48 to 9-30-48.

7. Injured was Divorced, and had one dependent, as follows: John Landro, age 16.

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed and the reason for filing this application is: To obtain medical treatment and compensation for disability to back resulting from said injury, and when condition becomes fixed to rate the permanent partial disability.

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Seattle, Washington, March 24, 1949.

/s/ JOHN LANDRO,

Applicant.

/s/ ROY E. JACKSON,

Attorney for Applicant. [33]

Alaska Workmen's Compensation Act
Territory of Alaska

Alaska Industrial Board

JOHN LANDRO,

Applicant,

vs.

LIBBY, McNEILL & LIBBY,

Defendant.

ADMISSION OF SERVICE AND ANSWER
TO APPLICATION

The defendant above named for answer to the application herein respectfully shows:

1. It is denied that applicant sustained an injury on or about the date set forth in application.
2. It is admitted that both the employer and

employee were subject to the Alaska Workmen's Compensation Act at the time of the alleged injury.

3. It is admitted that the relationship of employer and employee existed at the time of injury.

4. It is admitted that at the time of the alleged injury the employee was performing service arising out of and in the course of employment.

5. It is admitted that Notice of Injury was given employer as set forth in application.

6. It is denied that the applicant was temporarily disabled for the period stated in the application.

7. It is denied that the applicant was permanently disabled to the extent shown in application.

8. It is denied that the rate of wages as set forth in the application is correct. But that his daily average earnings or wages at the time of his injury were \$17.176 per day, and no more, which exceeded his average daily wages at other times of the year.

9. The defendant will insist that all evidence must be adduced according to legal rules for the admission of evidence and it is otherwise inadmissible, and will object to all ex parte evidence offered to prove or seek to prove any of the facts upon which the claimant bases his claim; and the

defendant will insist upon having a hearing before the full membership of the Board.

LIBBY, McNEILL & LIBBY,
Defendant.

By R. E. ROBERTSON,
Attorney for Defendant.

Dated at Juneau, Alaska, May 26, 1949.

Copy received May 26, 1949.

HENRY RODEN,
For Claimant. [34]

APPELLANT'S OBJECTIONS 4, 5, 6 AND 7
OF JANUARY 27, 1949

Comes now the defendant and objects to the hearing at this time on the following, among other grounds:

4. That it contends that evidence must be adduced in a legal manner, and not *ex parte*, and is entitled to the right of cross-examination of all of claimant's witnesses.

5. That it demands a hearing before the full board with all members of the board present.

6. That the law does not authorize or permit a hearing to be held upon the extent of alleged temporary disability and a later hearing upon partial permanent disability.

7. That claimant has, if any, only one claim.

Respectfully,

/s/ R. E. ROBERTSON,
Attorney for Defendant.

Copy received June 27, 1949.

HENRY RODEN,
Attorney for Claimant. [35]

DEPOSITION OF DEFENDANT LANDRO

The following people were present:

R. E. ROBERTSON,
Defendant's Attorney.

HENRY RODEN,
Applicant's Attorney.

HENRY A. BENSON,
Commissioner of Labor.

JOHN LANDRO,
Applicant.

Witness was sworn by Commissioner Henry A. Benson.

Q. What is your name?

A. John Landro.

Q. Where do you live, Mr. Landro?

A. 1116 Second Avenue, Seattle.

Q. What did you do during the year 1948?

A. I sailed part of the time and fished up in Bristol Bay, Ekuk Cannery from June 28 till the time I got hurt.

Q. Who did you work for?

A. Libby, McNeill & Libby.

Q. You were hired by Libby under the general Fishermen's Union Agreement?

A. That is correct.

Q. Under that contract they pay you a certain sum of money for the season?

A. It is based on the amount of fish caught and run money besides.

(Deposition of John Landro.)

Q. When did you get to the cannery in 1948?

A. June 28.

Q. When did you start fishing?

A. About 6:30 in the evening of the 28th.

Q. You fished up until when?

A. Up until July 6, 1948.

Q. What happened on that day?

A. On July 5, we fished all day and came back to the tally scow at Clarks Point about 6:30 before we got through delivering the fish. We stopped to get tally books and a bite to eat. [36] Meanwhile the tide changed. It was getting rougher by the minute. The main idea was to get away from the scow before we got smashed up. Jumping from the scow to the boat, I landed on the forecastle head of the boat which gave a heave which threw me off balance and landed on top of the anchor on my back. After this I crawled down from forecastle head into the forecastle after part of the boat. We got away from the scow about 50 to 75 yards and anchored for the night.

I was in great pain and unable to navigate.

Q. When you say navigate what do you mean?

A. I mean to get around in the boat as walking or crawling, etc.

Q. Was it necessary for you to jump off the scow onto the boat and why?

A. Yes, to keep the boat from being smashed up.

On July 6 we made a short drift off the river and I had a hard time to get nets up. I was in

(Deposition of John Landro.)

constant pain. Had to crawl instead of walking. While picking up nets and going towards the back of the boat I again fell on my back and landed across the fore and aft board in the clear room.

Q. Why did you slip there again; what caused it?

A. It was rough and because of my back was in such bad shape. I was unable to keep from falling. When we delivered fish I peved one fish which almost knocked me out. One of the other men had to do the rest of it.

We anchored away from the barge, as it was rough and I was in no condition to continue fishing. The next morning we went into the cannery.

Q. What did you do after you got to the cannery?

A. Went to the hospital. I was given heat treatments in morning. I was not able to go back to work. I rested in bunkhouse. I was taken into the hospital that evening.

Q. How long did you stay in the hospital?

A. From July 7 till July 14, received heat treatments and pills. Was then taken into Koggiung to Dr. Fortun. [37]

Q. Did Dr. Fortun examine you?

A. I went to the hospital and was put to bed. I was not examined until next morning. He removed taping by nurse at Ekuk, gave injections and pills to relieve pain.

Q. How long did you stay there?

(Deposition of John Landro.)

A. Until July 19 or 20. I left for Seattle.

Q. What condition were you in when you left Koggiung?

A. I was in terrible condition. It was terrible to get around, if I walked 25 yards to mess room, found it impossible to straighten up.

Q. What happened in Seattle?

A. I arrived the 21st or 22nd. I saw Dr. Williams on 23rd. I Dr. Gray.

Q. Dr. Gray is the insurance company doctor?

A. That is what I understand. He X-rayed me and examined my back. The doctor told me "you have a pretty bad back there," some bruises and bump. He said he could find no fracture. At the hospital I received injection, pills and physiotherapy treatments.

Q. Did you get any relief from these treatments?

A. About July 27 I was X-rayed again at Providence Hospital. Dr. Gray told me again that he did not find any fracture but it appeared that a vertebra was dislocated; opening in one side.

Dr. Gray told me I would be all right after a while.

They gave me injections and pills while I remained there and on July 31, Dr. Gray told me I could get by staying at home and coming in for injections. This I did for a week and had a terrible time getting around. Dr. Gray sent me for physiotherapy and massage 3 times a week at Provi-

(Deposition of John Landro.)

dence Hospital; twice a week for injections at his office. October 14 discontinued physiotherapy and injections; advised finding some light work. [38]

I tried to get light but none was obtained.

I saw Dr. Gray around the end of October. He asked me to report back in 10 days or 2 weeks. I reported back the middle of November. Gray advised me to go south to a warmer climate. I went to California to get relief but obtained none.

January 15, 1949, back was in bad shape. I tried to do various light work around the place to strengthen my back. I had sharp pains in the lower back when I attempted to pick up tools also my legs would buckle up on me and I would collapse. That happened 3 times on street stepping off sidewalk and 3 or 4 times at the house picking up tools.

First of February, 1949, went to see Dr. Le Cocq for examination. He found my back in pretty bad shape. Told me that I might have to have an operation. About the same time I saw Dr. Williams who also advised to have treatment as the back was in bad shape. I was confined to the house for three weeks because of the icy and slushy streets. I could not get around. It was between three and five weeks.

I saw Dr. Gray in middle of March, said I should have some treatment but he said he was informed by the Insurance Company that they would not pay for any more treatment. However, he said you should be entitled to some treatment at Harborview

(Deposition of John Landro.)

Hospital which is run by the county and gave me a note to report there for injection for physiotherapy and injection treatment.

Q. Did you go down to Harborview Hospital?

A. No. I neglected to go there. It is a charity hospital. I felt that insurance company should pay the bills in this case. I went to a hot springs which was recommended for this type of back injury. The name of the Hot Spring was St. Martin in Oregon. I mean Washington.

Was there 3 weeks taking hot baths and massage. Helped [39] temporarily. I returned to Seattle and attempted to find light work which I was unable to do.

Q. What is your condition at the present time?

A. It is up and down. It is not good at all. It is such that I could not do any hard work of pulling. There are days that I might be able to do light work but other days I couldn't begin to do any work at all.

Q. Why can't you?

A. Due to the condition of my back.

Q. How are your legs?

A. They pain me walking and after walking pains shoot down both legs. The hips pain all the time.

Q. At present time you are wearing a brace?

A. Yes, I am.

Q. Who prescribed it?

A. Dr. Gray. Dr. LeCocq adjusted the brace at

(Deposition of John Landro.)

later date and I have been wearing it ever since. It supports my back to some extent.

Q. How do you get along if you don't wear the brace?

A. I have tried to walk across street but it gives more pains—lower back and hips.

Q. What sort or type of work did you do up to this accident? A. Fishing and sailing.

Q. In the first part of 1948 what kind of work did you do?

A. Sailing then, Liberty ships over to Germany and Europe.

Q. What kind of a job did you have at that time?

A. At that time I was mate—first mate.

Q. What was the kind and nature of your work?

A. First mate's duties includes upkeep of the vessel and everything in general, tanks, crating, seeing the ship is in good shape for loading and unloading cargo. You are in and out of the holds while cargo is being loaded. [40]

Q. Can you do that kind of work now?

A. I won't be able to do this kind of work since injury I had in Alaska.

Q. Why can't you do it?

A. I haven't the strength to be in and out of holds as my back gives in on me and my legs won't allow me to stand on them for any period of time. I couldn't crawl down into the holds over tanks and into bilges and what have you.

(Deposition of John Landro.)

Q. Can you do the work of a fisherman as you have in the past?

A. That would be suicide for me to go in the fishing fleet. I couldn't possibly do the work.

Q. To the best of your judgment tell us how much of your earning ability—your ability to work have you lost?

A. I don't know what kind of light work I can do. Today I would say I wouldn't be able to do one-fourth of what I could do previous to injury.

Q. What kind of light work have you tried to get?

A. I applied to watchman. I tried to get job as mate but naturally had to explain about my back which would not be able to go in and out of holds. Also applied for checkers job on waterfront. Tried several factories.

Q. Before this accident did you ever suffer from any disease? A. No.

Q. Did you ever have an accident before?

A. No, I didn't.

Q. Did you ever have to lay off from work because of sickness? A. No.

Q. Tell us for the year 1948 up until the time this accident happened, how much money did you earn?

A. Beginning of the year making an average \$582.00 a month. Decided to go to navigation in order to increase my earning power. I spent about 2 months at this. At that time I could have [41]

(Deposition of John Landro.)

shipped out with the company I was with but decided to go fishing instead. Part-time work in May.

Q. How much did Libby, McNeill and Libby pay you for the season?

A. \$1,972.00 for the season at Ekuk cannery covering two months.

Q. How much did you earn before the season and if you had not attended navigation you could have earned how much? A. \$582.00 a month.

Q. What kind of work did you do in 1947?

A. I was sailing as mate in 1947.

Q. For the whole year?

A. For about 11 months, I lost some time changing ships.

Q. What was average monthly wages for 1947?

A. \$582.00 for 11 months.

Q. What was average for 1946?

A. (Interruption by defendant's attorney protesting this line of questioning.)

Q. Did you ever suffer rheumatism or arthritis prior to this injury? A. No, I did not.

Q. Dr. Fortun is the doctor that examined you where? A. Yes, at Koggiung.

Q. There was one statement made by the doctor in his deposition that you objected to?

A. Yes, Dr. Fortun stated that I receive physiotherapy treatments at Koggiung which is not so.

Q. You have one child under 18 years—how old?

A. 16 years old—son.

(Deposition of John Landro.)

Q. What statement do you object to of Dr. Fortun?

A. The statement that I received physiotherapy treatments at Koggiung.

Q. Mr. Landro is this receipt for \$680.70 compensation already paid? A. Yes. [42]

Q. Did you receive any other check from Libby, McNeill & Libby? A. No, sir.

Q. Weren't there run money of \$1,791.45?

A. That is correct, I didn't understand your point. We were late in arriving at the fishing grounds.

Q. Libby paid you \$1731.45 plus \$150.00 for season's wages? A. Yes, that is correct.

Q. During 1947, August, September and October, you worked as a mate for Pope and Talbot at \$582.00 per month? A. Yes.

Q. For the first half of month of January, 1948, you worked for same company? A. Yes.

Q. After middle you went to navigation school?

A. That is right.

Q. During that time you were not earning any wages? A. That's correct.

Q. Is it not true that during the month of May, 1948, you worked as relief mate on various vessels at \$1.85 per hour? A. Yes.

Q. That was before you left Seattle to go up to Ekuk to fish? A. Yes.

Q. How much did you earn as relief mate at \$1.85 per hour?

(Deposition of John Landro.)

A. Less than \$100 during the month of May.

Q. When you first got off the boat and went ashore at Ekuk Cannery on July 6th, after you slipped a second time, I understand that you received treatments there? A. A nurse.

Q. Was it Ann Morgan? A. It might be.

Q. Did you tell the registered nurse at that hospital that you became injured wrestling with the nets; in center table [43] of clearing room and hurt my back on board?

A. It could have been in that line.

Q. Did you tell the bookkeeper the same story?

A. Yes.

Q. Did the nurse examine your back at that time?

A. I can't say she examined it, she looked it over.

Q. What kind of heat treatments did she apply to your back?

A. An electric pad also massages and lamps.

Q. This accident occurred on the Nushagak River? A. Yes.

Q. How far off shore?

A. Middle of channel off Clark Point.

Q. Do you fish a seven day week?

A. Now we have time off, 36 hours off over weekend, 24 hours over Wednesday.

Q. Did you fish in 1947 season? A. No.

Q. Didn't Dr. Gray advise you to go to Harbor-view Hospital for an arthritic condition?

(Deposition of John Landro.)

A. I hesitated to go down to the county hospital, because I thought that the insurance company should take care of it.

Q. Could you have gotten a job on the boats after the fishing season?

A. Yes. I feel sure I could have.

Q. How much would you have made?

A. \$582.00 a month or more. The company I formerly worked for would have taken me back as they highly recommended me.

Q. Did you get your master's papers as a result of schooling? A. Yes.

(The defendant's attorney stated that there was no dispute as to whether the applicant could have earned the amount of money stated.)

Q. Have you ever fished Bristol Bay before?

A. Yes, this is my sixth season. Last season was in 1939.

Q. Did you fish for Libby all the time?

A. For different companies.

Q. Did you ever have an accident before this or have trouble with your back? A. No.

Q. Did you ever have pain in lower back?

A. No.

Q. You haven't done any work since accident?

A. No.

Q. Because of the fact you couldn't find light work?

A. Two-thirds of the time I couldn't even do light work.

(Deposition of John Landro.)

Q. Did Dr. Le Cocq tell you that you could do light work now that your brace is fitted properly?

A. No.

Q. When did Dr. Le Cocq say you would be able to go back to work? A. He didn't say.

Q. Did he recommend light work?

A. No. He recommended treatments.

Q. Did you see anyone except Le Cocq?

A. Dr. Williams.

Q. Did you notice any pain while pulling nets?

A. No. No pain.

Q. Did you fall on the back or just fall?

A. Yes, I fell on the back. I hit the back.

Q. How many doctors have you been to on this case? A. Four.

Q. Did you have an operation for a peptic ulcer in 1926? A. Yes.

Q. In 1929 weren't you treated for compound fracture?

A. Yes. It was so long ago I had forgotten it.

DEPOSITION OF O. J. FORTUN

Appearances:

HENRY RODEN, ESQ.,

ROY E. JACKSON, ESQ.,

Associate Counsel,

For the Applicant.

R. E. ROBERTSON, ESQ.,

ROBERT V. HOLLAND, ESQ., of

BOGLE, BOGLE & GATES,

For the Defendant.

Deposition of Dr. O. J. Fortun, a witness of lawful age, taken on behalf of the Defendant in the above-entitled cause pending before the Alaska Industrial Board, pursuant to oral agreement of counsel for the respective parties, before H. W. Boylan, a Notary Public in and for the State of Washington, at 603 Central Building, Seattle, Washington, on the 23rd day of May, 1949.

It was stipulated by and between counsel for the respective parties that all objections except as to the form of questions or the responsiveness of the answers thereto are reserved until the deposition is offered in evidence at the time of trial.

O. J. FORTUN

a witness called on behalf of the Defendant, being

of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Holland:

Q. State your name, please.

A. O. J. Fortun.

Q. Where do you live, Doctor?

A. 8509 Greenwood Avenue.

Q. What is your occupation?

A. Physician and surgeon.

Q. Where is your place of business? [46]

A. 8509 Greenwood.

Q. You live and work in the same place?

A. No, I don't live there, that is my office.

Q. You live in Seattle?

A. Live in Seattle, yes.

Q. How long have you held a license to practice medicine? A. About 30 years—close to it.

Q. Are you duly and regularly licensed to practice in the State of Washington? A. I am.

Q. Where did you obtain your medical degree?

A. Chicago.

Q. Where was that?

A. I was mostly at the University of Chicago but I got my diploma from Loyola University.

Q. Did you take any other education following receipt of your diploma, Doctor?

A. I had it before.

Q. Your previous education?

A. Yes, I spent the year 1900 at the University

(Deposition of O. J. Fortun.)

of Berlin and in 1913 I spent half a year in London in the hospitals there.

Q. On those occasions were you specializing in any field at all, Doctor? A. No, in general.

Q. General practice, yes?

A. General practice, yes.

Q. Have you been practicing since you obtained your license? A. Yes, steadily.

Q. Was that general practice, Doctor?

A. Yes, yes.

Q. When did you first work for Libby, McNeill and Libby?

A. That was in 1947, because I couldn't find an office in Seattle. [47]

Q. And at that time where did you work for them? A. At Koggiung.

Q. Prior to that time what had you been doing?

A. Been out in one of the clinics in Seattle.

Q. How long had you been with that clinic, Doctor?

A. Five years, I think—four years, anyhow. Before that 20 years in Everett.

Q. Prior to the clinic you were 20 years in Everett? A. Yes.

Q. Were you in a clinic in Everett or by yourself?

A. By myself. I had a man with me sometimes.

Q. Doctor, do you recall a Libby workman during the 1948 season named John Landro?

A. I do.

(Deposition of O. J. Fortun.)

Q. Did you examine or treat him at any time?

A. I did.

Q. In what way did knowledge of this man's condition first come to you?

A. Well, he was sent from Ekuk to the hospital at Koggiung and I treated him—examined him and treated him and found that he had a back that was, in a general term, sometimes called lumbago from exposure to rain and cold winds.

Q. Was there a hospital, did you say, at Koggiung? A. Yes.

Q. Who operated that hospital?

A. Well, it was Libby and McNeill—I was in charge of it.

Q. How large was that hospital in terms of beds?

A. Oh, I think 12—I don't remember exactly now.

Q. When did you make your first examination of Landro in relation to when you first saw him at Koggiung?

A. He came in the evening and that was the 14th of July and I think—really, I looked him over the 15th. [48]

Q. The following day?

A. Yes, the following day.

Q. What was his condition when he arrived at Koggiung as to whether or not he was ambulatory?

A. Well, he was able to walk from the plane to the hospital.

(Deposition of O. J. Fortun.)

Q. Did you give any treatment to this man following your examination? A. Yes.

Q. State briefly what you did.

A. Salicilates and physiotherapy.

Q. Over what period of time, Doctor?

A. About four days.

Q. During that time where was the man?

A. In the hospital.

Q. Would you describe the physiotherapy that was given?

A. Well, of course, it was mostly infra-red light and massage—things you give for a sore back.

Q. And after the four-day period what occurred, if anything?

A. Well, he stated to me he wasn't getting any better, so I realized that he wasn't going out fishing again and I advised the superintendent to send him to the hospital to Seattle or whatever they wanted.

Q. Did you form any conclusions at that time as to whether his condition was from a natural ailment or from injury?

A. Well, I couldn't make out any injury but the man was sick—sure he was.

Q. Did you find any external evidence on the skin of any injury, Doctor? A. No, I didn't.

Q. Did you make an examination for such condition? A. Yes, certainly.

Q. Following the four-day period, what was done with the man?

A. He was sent to Seattle, I think.

(Deposition of O. J. Fortun.)

Q. Did you see him at any time after that? [49]

A. No, no.

Q. Did you obtain any history at all, Doctor, of the man's immediate past?

A. Well, so many would come in and claim they fell down in the boat where I couldn't find any injury and as a rule they would go out again and continue fishing.

Mr. Holland: Would you mark this for identification?

(Document referred to marked Defendant's Exhibit 1 for identification.)

Q. Handing you what has been marked Defendant's Exhibit 1, would you state what that is?

A. That is the letter to the office manager in Seattle at the time he left.

Q. By whom was that letter written?

A. That was written by me.

Q. Is that the original of the letter written by you, Doctor? A. It is.

Q. Is that your signature down at the foot of that letter? A. It is.

Mr. Holland: I will offer that in evidence or you may reserve your objections until the time of hearing if you wish. In any event I will offer it now.

Mr. Jackson: All right—we object to it on the grounds it is wholly immaterial. The man's claim was recognized by the company, he was placed in the hospital and treated for an accident upon arrival in Seattle where he spent a period of time in Provi-

(Deposition of O. J. Fortun.)

dence Hospital and Dr. Gray has treated him for an injury——

Mr. Holland: Well, you don't argue the case on your objection. That is all I have.

The Witness: Of course we were handicapped. We didn't have any chance for an X-ray. [50]

Cross-Examination

By Mr. Jackson:

Q. Doctor, what is that hospital up there—sort of a first aid station?

A. Well, it is supposed to be a little more.

Q. A little more? A. Yes.

Q. And in your practice here, what clinic were you with, Doctor? A. Bridge.

Q. And then you couldn't find any office in 1947 and didn't work in 1947 except what you——

A. Well, I quit the clinic in the first part of 1947 and began to look for an office, then when I couldn't find any office I went up for Libby.

Q. How old a man are you, Doctor?

A. Oh, I am past 70.

Q. You say you are past 70—how old?

A. 74—exactly.

Q. Where were you located here in town for the Bridge Clinic?

A. That is on Summit Avenue.

Q. Were you up here with Dr. Pieroth?

A. Yes.

(Deposition of O. J. Fortun.)

Q. Now, Doctor, when Mr. Landro came to you on—you say July 14th, 1948? A. Yes.

Q. He told you at that time, did he, that he had had an accident?

A. He did. He told me he fell down in the boat.

Q. And injured his back?

A. Well, he had a bad back.

Q. He had a bad back? A. Yes.

Q. Now, what facilities did you have in that hospital—did you have any facilities there to determine whether or not he had had a spine injury?

A. No, we didn't have any X-ray. We had a fluoroscope but you see that wouldn't do any good so I didn't use it because a man under those conditions should have an X-ray.

Q. You had no X-ray there? A. No, no.

Q. So I take it then that he had a spasm of muscles in the back? A. Yes, I grant that.

Q. And he was a pretty sick man?

A. Well, I said that he was sick.

Q. And he was in bed practically the whole time he was there in the hospital?

A. Well, I wanted him to stay in bed.

Q. Yes, and it was a matter of trying to improve his condition, you felt rest was one of the things that might improve his back? A. Yes.

Q. And after he was there four days it appeared that he was not improving, is that correct?

A. Yes.

Q. And it was decided that probably the best thing to do would be to send him out?

(Deposition of O. J. Fortun.)

A. Yes.

Q. Where he could get proper medical attention?

A. Yes.

Q. Is that correct?

A. Well, that was the idea, that we couldn't do any more for him.

Q. And you would have to have X-rays taken to determine what, if anything, could be done——

A. That is the proper thing.

Q. ——to assist him? A. Yes.

Q. Is that correct? A. Yes. [52]

Q. And that is the reason you recommended he be sent out? A. Yes.

Q. Now, Doctor, are you a specialist in treating spinal injuries?

A. No, I don't claim to be that.

Q. And if you have a case that comes into your office that involves a spine injury, what generally do you do? A. Take an X-ray.

Q. I mean do you refer the case to someone else?

A. Well, it depends on what the X-ray shows.

Q. Yes, but before you make any determination as to what is wrong you have to have an X-ray taken? A. Yes, yes.

Q. And you don't just look at a man's back when he comes in and tells you he has an injury?

A. Well, of course, there are lots of things that indicate to us—even before we didn't have any X-rays I was practicing medicine and I can determine whether or not a bone is broken and naturally

(Deposition of O. J. Fortun.)

the X-ray makes things so much more simple. That is why we have to be careful about our fingers, that is why I don't go out and do any bricklaying or things like that because then the sensitiveness of the fingers wouldn't be there. That is why with appendicitis you can determine those things by touch.

Q. Doctor, do you have any knowledge of arthritis? A. All there is to be known.

Q. You know everything there is to be known?

A. Yes, because my wife has arthritis.

Q. What effect does an injury to the back have on arthritis? A. Well, it aggravates it.

Q. Aggravates it? A. Yes.

Q. And makes it worse? A. Yes. [53]

Q. Is arthritis a painful condition when it is aggravated? A. Certainly.

Q. And you can have arthritis if it is dormant it doesn't cause you any trouble?

A. Well, of course, it causes a certain amount of stiffness and inconvenience.

Q. Well, I mean if it is not bothering you.

A. In the line of pain?

Q. That is what I mean. A. Yes.

Q. But if you aggravate it by injury it can become very painful? A. Yes, yes.

Q. You haven't had occasion to review any of the X-rays that were taken of Mr. Landro?

A. No, I haven't.

Q. You know nothing more about this case than what you saw in the first four days? A. No.

(Deposition of O. J. Fortun.)

Q. That is all you know about it?

A. That is all I know.

Q. And you felt that when Mr. Landro went out from Alaska that he was in need of further treatment?

A. Well, that was one thing I didn't make up my mind about.

Q. Well, he was in pretty bad shape when he left there, wasn't he?

A. Well, the thing is he was in about the same shape as when he came.

Q. I see—that is, he didn't improve?

A. No, I wouldn't say that he improved.

Q. And he was a pretty sick man when he came in and a pretty sick man when he came out?

A. Well, he was able to walk.

Q. But it was very difficult for him to get around?

A. Well, I don't say it was so difficult for him but he [54] naturally—I realized he was uncomfortable. Of course, we had such nasty weather with wind and rain and there was so much of that misery among the fishermen, you see, at the time, and I told Landro that he certainly was wise in quitting because it was a dog's life and he wasn't built for being a fisherman.

Q. Well, now, having had an injured back as he described it to you, he was in need of treatment, there isn't any question about that?

A. Well, I have no opinion just what things

(Deposition of O. J. Fortun.)

would be after he left there, you see, because up there it was cold and dreary and miserable conditions.

Q. But isn't this a fact, that he was in need of treatment when he left there, for his back?

A. Well, the treatments we had given didn't seem to help him any, so that is why I didn't know if any treatment would do him any good at all.

Q. But you didn't have anything to treat him with there?

A. I had everything except X-ray.

Q. But you didn't know what was in his spine?

A. Well, I know everything there is written about arthritis.

Q. Well, I am asking you this——

A. But so far as to tell what was in his spine that is expecting too much, like telling what is in your head—I can't do it.

Q. I mean, without the X-ray studies you were unable to make a definite diagnosis?

A. I was unable to make out any injury, that's right.

Q. I mean you were not able to make a definite diagnosis?

A. Well, I made a diagnosis in my mind as far as a man might judge—qualified me to do.

Q. Doctor, what is lumbago?

A. It is inflammation of the muscles that have to do with the back and when I put my fingers on those muscles I could tell right away which muscle it is because they are tense, they have lost [55]

(Deposition of O. J. Fortun.)

their elasticity and the tenseness and cramping causing a pinching of the nerve endings and causes aching.

Q. And when the muscle becomes stiff like that it is in spasm? A. Yes.

Q. And that shows there is a painful muscle?

A. Certainly.

Q. And when you have an aggravation of an arthritis you have painful muscles, too?

A. Yes, yes.

Q. And you have the same type of spasm?

A. Yes.

Q. Is that correct? A. Oh, that is correct.

Mr. Jackson: I think that is all.

Redirect Examination

By Mr. Holland:

Q. Doctor, was any discussion had between you and the man, himself, concerning his leaving Kogiung and returning to the United States?

A. Well, no, I couldn't say exactly. I just told him that if I was in his place I would quit, absolutely quit because it was a dog's life to be a fisherman up there the way it was, you see, and I had so many of those strong, husky fellows even who came in with back pain that he wasn't the only one. Usually after a few days we had them out fishing again.

Mr. Holland: I have no further questions.

Mr. Jackson: That is all.

(Deposition concluded.) [56]

Certificate

State of Washington,
County of King—ss.

I, H. W. Boylan, a Notary Public duly commissioned and qualified in and for the State of Washington, do certify that, pursuant to oral agreement in and for the State of Washington, do hereby certify that, pursuant to oral agreement of counsel for the respective parties, there came before me on the 23rd day of May, 1949, at 1:00 o'clock p.m., at 603 Central Building, Seattle, Washington, the following named person, to wit, O. J. Fortun, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing under my supervision;

That the deposition is a true record of the testimony given by the witness; and that the reading over by or to the said witness of his said deposition, and his subscription thereto, were by counsel for the respective parties expressly waived.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In Witness Whereof I have hereunto set my hand

and affixed my notarial seal this 23rd day of May, 1949.

[Seal] H. W BOYLAN,

Notary Public in and for the State of Washington,
Residing at Seattle.

My commission expires March 6, 1950. [57]

MINUTE ORDER OF JANUARY 18, 1950
JOURNAL No. 19, PAGE 360

These cases came before the court for hearing on plaintiff's appeal from the decision of the Industrial Board. R. E. Robertson appeared for plaintiff and Henry Roden appeared in behalf of the claimants. Mr. Robertson argued plaintiff's case at great length, closing the same at 5:10 p.m.

DISTRICT COURT'S OPINION

R. E. ROBERTSON,

Attorney for Plaintiff.

J. GERALD WILLIAMS,

Attorney General of Alaska.

JOHN DIMOND,

Assistant Attorney General of Alaska, for
Alaska Industrial Board, and

HENRY RODEN,

For John Landro, Defendants.

This is a proceeding to set aside an award of compensation to John Landro for temporary disability.

Finding that Landro injured his back as a result of falls on July 5th and 6th, 1948, and sustained temporary disability to May 20, 1949, the Alaska Industrial Board awarded him \$2,577.96, and, holding that it was unable, in view of the conflict in the evidence, to make any determination as to permanent disability, the Board ordered a further physical examination at the expense of plaintiff-employer.

The questions argued are:

(1) Whether the Board is empowered to order the plaintiff, as employer, to pay for a medical examination after the expiration of a year from the date of the injury.

(2) Whether the Board may postpone determining the degree of permanent disability, after making an award for temporary disability; and

(3) Whether the findings of the Board as to temporary disability is supported by any substantial evidence.

I am of the opinion that under Section 43-3-2 ACLA, 1949, the cost of examination ordered by the Board must be borne by it instead of the plaintiff.

In the absence of statutory provision, the second question must be decided on general considerations. It should be borne in mind that a proceeding of this kind is *sui generis* and that the primary purpose of statute is to make just provision by way of compensation for disability. It may not, therefore, be analogized to the ordinary civil [59] action so far as postponing decision is concerned. I am of the opinion that the Board is authorized to continue the determination of permanent disability if the evidence before it, or lack thereof, appears to warrant such action.

As to the third point, it may be conceded that the evidence preponderates in plaintiff's favor; but it is settled that the administrative body such as the Alaska Industrial Board is not bound to accept the opinion or theory of the employer's medical experts, even though uncontradicted, as against the evidence of the employee. The Court cannot say from an

examination of the testimony of Landro that it is insufficient to sustain the award.

GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed February 23, 1950.

JUDGMENT

This cause came on regularly for hearing before the Court on appeal by plaintiff corporation from a decision and award rendered and made by the Alaska Industrial Board on June 28, 1949, in a proceeding then pending before said Board wherein it awarded to the defendant John Landro temporary disability compensation in the sum of \$2577.96 for the period from October 1, 1948, to May 20, 1949, both inclusive, at the rate of 65% of \$17.176, his average daily wage, or \$11.16 for 231 days, which average daily wage he earned prior to sustaining disability arising out of and in the course of his employment by plaintiff; and

It appearing that the defendant Landro has asserted a claim not only for temporary total disability but also partial permanent disability, but that, while no award has been yet made on the partial permanent disability claim, no just reason exists for delaying the entry of judgment sustaining the defendant Board's award for temporary total disability, it is ordered and directed that judgment now be entered sustaining the defendant

Board's award to the defendant Landro for temporary total disability.

Now, Therefore, upon consideration of the evidence submitted and the argument of counsel for the respective parties the Court finds that there is sufficient evidence to suport the findings and award of the said Board and the same are hereby affirmed, and

It Is Ordered, Adjudged and Decreed that defendant John Landro do have and recover of and from the plaintiff the sum of \$2577.96 which became due and payable in monthly installments of \$334.80, commencing November 1, 1948, up to and including May 20, 1949, together with interest at the rate of eight per cent per annum on the respective amounts from the time the same became due and payable up to the time the same are paid, making the total sum of \$2805.00 now due and owing said defendant John Landro from said plaintiff, and

It is further Ordered, Adjudged and Decree that plaintiff do have and recover of and from said plaintiff corporation all expenses incurred by him for medical and hospital treatment by reason of said injury for the period of one year from and after July 6, 1948, together with his costs and disbursements herein including an attorney's fee in the sum of \$200.00.

Done in open court, at Juneau, Alaska, this 24th day of March, 1950.

GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed March 24, 1950. [62]

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from that certain Final Judgment entered in the above-entitled cause on March 24, 1950.

Dated at Juneau, Alaska, this 28th day of March, 1950.

R. E. ROBERTSON,
Attorney for Plaintiff.

Copy received March 31, 1950.

HENRY RODEN,
Attorney for Defendant
Landro.

[Endorsed]: Filed April 3, 1950. [63]

SUPERSEDEAS ON APPEAL

Whereas, Libby, McNeill & Libby, the plaintiff corporation in the above action, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment rendered against it in the above action by the District Court for the Territory of Alaska, First Judicial Division, on March 24, 1950, in favor of the defendant John Landro for total temporary disability compensation of \$2,805.00 under the Workmen's Compensation Law of Alaska, and for all expenses incurred by said defendant for medical and hospital

treatment by reason of his injury for the period of one year from and after July 6, 1948, together with his costs and disbursements herein including an attorney's fee of \$200.00; and

Whereas said plaintiff is desirous of staying the execution of said judgment so appealed from, and the defendants have agreed that the penal amount of the supersedeas shall be \$3,500.00.

Now, Therefore, in consideration of the premises and such appeal, we Libby, McNeill & Libby, plaintiff corporation, as Principal, and the Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland and engaged in and authorized to engage in business in the Territory of Alaska, as Surety, do hereby jointly and severally undertake and promise, and acknowledge ourselves bound in the sum of \$3,500.00 that the plaintiff corporation Libby, McNeill & Libby will satisfy said judgment in full, together with all costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and will satisfy in full such modification of said judgment and such costs, interest, and damages, as the appellate court may adjudge and award.

In Witness Whereof Libby, McNeill & Libby, plaintiff corporation, as Principal, and Maryland Casualty Company, a corporation, as Surety, have caused these presents to be executed this 29th day of March, 1950, in Juneau, Alaska. [64]

Executed in the presence of:

EILEEN ROBERSON,
F. O. EASTAUGH,
DORA M. SWEENEY,
SHIRLEY M. CADY.

LIBBY, McNEILL & LIBBY,
Principal.

By R. E. ROBERTSON,
Its Attorney and Agent.

MARYLAND CASUALTY
COMPANY,
Surety.

[Seal] By ALLEN SHATTUCK,
Its Attorney-in-Fact and
Agent.

Attest: Corporate Seal.

United States of America,
Territory of Alaska—ss.

Acknowledged before me this 29th day of March, 1950, in Juneau, Alaska, by R. E. Robertson as attorney and agent of the plaintiff corporation Libby, McNeill & Libby as its free and voluntary act and deed and by Allen Shattuck as attorney-in-fact and agent on behalf of the Maryland Casualty Company, a corporation, surety, as the latter's free and voluntary act and deed.

Witness my hand and the official seal the day and year herein first written.

[Seal] FREDERICK O. EASTAUGH,
Notary Public for Alaska.

My Commission Expires June 10, 1950.

Approved as to form, amount, and sufficiency of surety this 31st day of March, 1950.

HENRY RODEN,
Attorney for Defendant John Landro.

Approved and appeal allowed this 3rd day of April, 1950, at Ketchikan, Alaska.

GEORGE W. FOLTA,
Judge of the District Court for the Territoy of Alaska, Division No. 1.

[Endorsed]: Filed April 3, 1950. [65]

STATEMENT OF POINTS

Plaintiff corporation, Libby, McNeill & Libby, appellant herein, intends to rely upon the following points on appeal.

1. Under the Workmen's Compensation Act of Alaska the Alaska Industrial Board's findings, decision and award must be based upon competent evidence according to the weight of such competent evidence, and not upon ex parte, hearsay, unverified, or other incompetent evidence, whereas the

Board's decision and award and its findings herein were based upon ex parte, hearsay, unverified, or other incompetent evidence and therefore were not conclusive upon the District Court.

2. The only competent evidence adduced at the hearing before the Alaska Industrial Board proved that Landro's total temporary disability ended on October 1, 1948, to which date he was paid compensation of \$680.76, whereas the Board's decision and award as well as the District Court's judgment held he also suffered total temporary disability from October 1, 1948, until May 20, 1949, and was entitled to compensation therefor of \$2805.00 which includes interest computed upon monthly payments to March 24, 1950.

3. The only competent evidence adduced at the hearing before the Alaska Industrial Board proved that Landro suffered 10% permanent disability from an injury by accident arising out of and in the course of his employment, for which he was entitled to be paid compensation, computed according to the statute, after first crediting thereon \$680.76 already paid him as total temporary disability compensation, whereas the Board's decision and award as well as the District Court's judgment held that Landro's percentage of partial permanent disability was not established at the hearing and reserved the determination thereof for a future hearing before the Board, notwithstanding the Workmen's Compensation Act of Alaska does not authorize or empower the Board to determine tem-

porary total disability and to award compensation therefor [66] but to disregard the weight of competent evidence as to percentage of permanent disability and to reserve the determination thereof for a future hearing.

4. The District Court's judgment disregarded the fact that the Alaska Industrial Board's decision and award and its findings were based solely upon ex parte, hearsay, unverified or other incompetent evidence, and were against the weight of the only competent evidence adduced at the hearing before the Board, and were not conclusive upon the Court, particularly in respect to:

(a) Finding Landro suffered total temporary disability to May 20, 1949, instead of to October 1, 1948, only.

(b) Awarding Landro total temporary disability compensation of \$2805.00 (which includes 8% interest upon monthly payments computed to March 24, 1950) to be paid him, instead of finding Landro was entitled to no compensation except \$680.76 only which had already been paid him.

(c) Finding that the evidence at the hearing was in such conflict that the percentage, if any, of Landro's permanent disability could not be determined, instead of finding that the only competent evidence adduced at the hearing proved that Landro suffered 10% permanent disability and was entitled therefor to compensation, computed according to the statute, after first crediting thereon \$680.76 total temporary disability compensation already paid him.

5. The Workmen's Compensation Act of Alaska does not authorize or provide for the award for the same injury to the same employee not only of Temporary, either partial or total, disability compensation but also of permanent, either partial or total, disability compensation arising by accident out of and in the course of his employment, whereas the District Court's judgment as well as the Alaska Industrial Board's decision and award allowed Landro, who sustained only one injury in the [67] same accident, total temporary disability compensation up to May 20, 1949, but reserved the determination of Landro's percentage of permanent disability to a later hearing before the Board.

6. The District Court was without jurisdiction to allow and assess an attorney's fee of \$200.00, or any sum, to Landro for services of his attorney in the proceedings before that Court.

R. E. ROBERTSON,
Attorney for Plaintiff
Appellant.

Copy received April 18, 1950.

HENRY RODEN,
Attorney for Defendant John
Landro.

J. GERALD WILLIAMS,
Attorney General for Alaska and Attorney for
Alaska Industrial Board.

[Endorsed]: Filed April 18, 1950. [68]

ALL DOCKET ENTRIES IN No. 6139-A

1949

Aug. 6—Case transferred from Anchorage.

Oct. 26—Defendant's Answer filed.

1950

Jan. 11—Motion to set for hearing filed.

Jan. 13—Minute Order—Case set for hearing to follow 6075-A or about Wednesday next.

Jan. 21—Brief of Plaintiff filed.

Jan. 18—Minute Order—Case before Court for argument on appeal.

Jan. 19—Minute Order—Argument continued on Alaska Industrial Board file filed. Under advisement.

Feb. 8—Received from M. E. S. Brunelle, Clerk at Anchorage.

Mar. 16—Motion for Judgment filed.

Mar. 24—Minute Order—Upon Claimant's Motion for Judgment Court signed same. Court set Supersedeas Bond at \$3,500 with which attorney for Landro concurred.

Mar. 24—Judgment filed and entered.

Apr. 3—Notice of Appeal filed. Copy served on Alaska Industrial Board.

Apr. 3—Supersedeas on Appeal filed.

Apr. 18—2nd Designation of Contents of Record on Appeal and Statement of Points filed.

SECOND DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

The defendant, John Landro, respectfully suggests and requests that in addition to the portions set forth in plaintiff-appellant's "Designation of Contents of Record on Appeal" the following part of the evidence submitted by defendant John Landro upon the hearing of this cause, be made a part of the record on appeal, to wit:

The letter of Doctor E. A. LeCocq, dated February 4, 1949.

/s/ HENRY RODEN,
Of Attorneys for Defendant
John Landro.

Copy received this 9th day of May, 1950.

/s/ R. E. ROBERTSON,
Attorney for Libby, McNeill
& Libby.

[Endorsed]: Filed May 9, 1950. [70]

LETTER OF DR. E. A. LeCOCQ

February 4, 1949

Mr. Roy E. Jackson, Attorney
American Building
Seattle 4, Washington

Re: Mr. John Landro, 2415 W. Boston, Seattle 99, Wash.

Dear Mr. Jackson:

This man was examined today, February 4th, at your request. He gave the following history: He was injured in Alaska while working for Libby, McNeill Company, on July 5, 1948. At that time, he was delivering fish and in jumping from his boat, he fell striking the lower back. He noticed immediate pain in the low back but tried to work the next two days. In order to do so it was necessary for him to crawl about to accomplish whatever he wished to do. Subsequently he developed bilateral sciatic radiation, worse on the left. This was noticed first in August of 1948. The intensity of the pain has remained about the same. He has noticed no definite improvement. On coughing or sneezing, he notices definite aggravation of the pain in the back with no apparent radiation. On occasions he has radiation of the pain into the hips. He has never noticed numbness or tingling in either leg or otherwise, he states he has been in good general health. In regard to work, he has not been able to work since the accident.

The past history is essentially negative, as is the family history. The previous operations have consisted of abdominal surgery in 1926 for a peptic ulcer, most probably a gastro-enterostomy, and in 1929, treatment of a compound fracture.

Examination revealed the pertinent findings to be limited to the low back. There was an increased dorsal rotundum involving the dorsal spine. The posture was definitely poor and the normal lumbar lordosis was definitely accentuated, a compensatory basis secondary to the above. In addition, there was considerable muscle spasm present in the low back. The chest expansion was $2\frac{1}{2}$ ". Flexion of the lumbar spine was definitely limited and guarded. Lateral bending and hyperextension was quite painful and limited also. Straight leg raising bilaterally was [71] not limited but on the extremes of this maneuver he noticed pain in the back of rather intense nature. The neurological examination throughout was essentially negative. Upon complete back flattening, the patient noticed complete relief of symptoms.

Radiographs which were made, consisting of A. P. and lateral views of the lumbosacral spine, revealed the following Findings: There was a definite accentuation of the normal lumbar lordosis with the sacrum approaching the very horizontal position. In addition, there was narrowing of the 5th intervertebral disc space posteriorly, and hypertrophic lipping was seen about the anterior margins about the vertebral bodies, predominantly the 4th lumbar.

Conclusions and recommendations: This patient's condition at the present time is due to an increased dorsal rotundum with secondary accentuated compensatory lumbar lordosis. This is actually on a postural basis but has been severely aggravated by his fall incurred on July 5, 1948. Therefore, it is felt that his condition is not fixed and that definite further treatment is in order at this time. The treatment should consist of application of an appropriate type of three-point pressure brace. The patient states that he now has a brace and we wish to inspect this brace to see whether it is adequate or not. If not, a Knight spinal brace will be necessary. In addition, he was instructed how to carry out postural position.

If his course is not satisfactory by conservative measures, then the only alternative would be consideration of a localized spinal fusion, limited to the lumbosacral joint.

Sincerely yours,

E. A. LeCOCQ,
M.D.

DEAL:EMP

P. S. The patient brought his brace in for inspection today, February 7th. This is to be refitted to give three-point pressure. We also wish to give him some postural work and would appreciate authorization for this.

E. A. L. [72]

In the District Court for the Territory of Alaska
Division Number Three at Anchorage.

No. 6139-A

LIBBY, McNEILL & LIBBY, a Corporation,
Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD, Composed of
the Territorial Insurance Commissioner, At-
torney General for Alaska, and the Territorial
Commissioner of Labor, and John Landro,
Defendants.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Plaintiff corporation, Libby, McNeill & Libby, appellant herein, hereby designates the hereinafter mentioned portions of the record, proceedings, and evidence, to be contained in the record on appeal and requests the Clerk of the above Court, to promptly prepare and under his hand and the seal of the Court to transmit to the United States Court of Appeals for the Ninth Circuit a true copy thereof in accordance with the rules of the appellate court, but to omit from all papers, except this Designation, the title of the court and the number and title of the cause, namely:

1. This Designation.
2. Complaint and Appeal from Decision and Award of Alaska Industrial Board under the Work-

men's Compensation Act of Alaska, together with the three exhibits thereto attached, namely:

I. Deposition of Dr. A. Bernard Gray.

II. Decision and Award of Alaska Industrial Board.

III. Letter of Dr. L. E. Williams of May 20, 1949.

3. Stipulation making Landro a party defendant.

4. Answer of defendant Landro.

5. Application for Adjustment of Claim.

6. Admission of Service and Answer to Application.

7. Appellant's Objections 4, 5, 6, and 7, of January 27, 1949.

8. Deposition of defendant Landro.

9. Deposition of Dr. O. J. Fortun.

10. Minute Order of January 18, 1950.

11. District Court's Opinion.

12. Judgment of March 24, 1950.

13. Notice of Appeal.

14. Supersedeas on Appeal.

15. Statement of Points upon which appellant intends to rely, and which are filed herewith.

16. All docket entries.

/s/ R. E. ROBERTSON,

Attorney for Plaintiff-
Appellant.

Copy received April 18, 1950.

/s/ HENRY RODEN,

Attorney for Defendant John
Landro.

/s/ J. GERALD WILLIAMS,
Attorney General for Alaska and Attorney for
Alaska Industrial Board.

Receipt of copy acknowledged.

[Endorsed]: Filed April 18, 1950.

CERTIFICATE

United States of America,
District of Alaska, Division No. 1—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 72 pages of typewritten matter, numbered from 1 to 72, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the Designation of Contents of Record on Appeal of Appellant on file herein and made a part hereof, in Cause # 6139-A, wherein Libby, McNeill & Libby, a corporation, is Plaintiff-Appellant and Alaska Industrial Board, et al. and John Landro are Defendants-Appellees, as the same appears of record and on file in my office; that said record is by virtue of an appeal in this cause.

And I further certify that by stipulation of the parties and with the consent of the Court the reporting of this case by the official Court Reporter was waived.

I further certify that the transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to Thirty-Six Dollars and 80/100 has been paid by Counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and the seal of the above-entitled court this 23rd day of May, 1950.

J. W. LEIVERS,

Clerk of the District Court.

[Seal]: By /s/ D. E. McIVER,

Deputy.

[Endorsed]: No. 12561. United States Court of Appeals for the Ninth Circuit. Libby, McNeill & Libby, a Corporation, Appellant, vs. Alaska Industrial Board, Composed of the Territorial Insurance Commissioner, Attorney General for Alaska and the Territorial Commissioner of Labor and John Landro, Appellees. Transcript of Record. Appeal from the United States District Court for the Territory of Alaska, First Division.

Filed June 1, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

